RECORD AND BRIEFS

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No. 16-980

In the Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR AMERICAN HISTORY PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. Purging For Non-Voting Was Justified As A Measure To Keep Accurate Voter Rolls, But The Practice Raised Profound Concerns 6

II. Congress Acted To End The Practice Of Purging Citizens From Registration Lists For Non-Voting When It Passed The NVRA 16

A. Congress Was Concerned Over The Effect Of Non-Voter Purges On Voter Participation 18

B. Congress Prohibited States From Considering Non-Voting In A Registrant Removal Process Except To Confirm Independent Evidence Of Voter Ineligibility 23

III. The Department Of Justice Historically Interpreted The NVRA As Prohibiting Purge Practices Like Ohio's Supplemental Process 27

IV. HAVA Does Not Supersede The NVRA's Prohibition On Non-Voter Purge Practices 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Citizens' Committee for the Recall of Jack Williams v. Marston,
507 P.2d 113 (Ariz. 1973) 14

Duprey v. Anderson,
518 P.2d 807 (Colo. 1974) 14

Gonzales v. Oregon,
546 U.S. 243 (2006) 29

Hoffman v. Maryland,
928 F.2d 646 (4th Cir. 1991) 14

Michigan State UAW Community Action Program Council (CAP) v. Austin,
198 N.W.2d 385 (Mich. 1972) 4, 14

New York Trust Co. v. Eisner,
256 U.S. 345 (1921) 1

Reynolds v. Sims,
377 U.S. 533 (1964) 3

Simms v. County Court,
61 S.E.2d 849 (W. Va. 1950) 14

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Toney v. White,
476 F.2d 203 (5th Cir.), *vacated in part on reh'g en banc*, 488 F.2d 310 (5th Cir. 1973) 5, 15

Williams v. Osser,
350 F. Supp. 646 (E.D. Pa. 1972) 15, 16

STATUTES

52 U.S.C. § 20501(b)(1) 17

52 U.S.C. § 20504 17

52 U.S.C. § 20505 17

52 U.S.C. § 20506 17

52 U.S.C. § 20507(b)(1) 24

52 U.S.C. § 20507(b)(2) 18, 23, 30

52 U.S.C. § 20507(c) 25

52 U.S.C. § 20507(d) 25

52 U.S.C. § 20507(d)(1) 26

52 U.S.C. § 21083(a)(4)(A) 31

52 U.S.C. § 21145(a)(4) 30

Pub. L. No. 89-110, 79 Stat. 437 (1965) 6

Pub. L. No. 103-31, 107 Stat. 77 (1993) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Pub. L. No. 107-252, 116 Stat. 1666 (2002) 6

LEGLISLATIVE MATERIALS

H.R. Rep. No. 101-243 (1989) 17

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H.R. Rep. No. 107-329, pt. 1 (2001) 30

H.R. Rep. No. 107-730 (2002) (Conf. Rep.) 6, 31

S. Rep. No. 101-140 (1989) 16, 17

S. Rep. No. 103-6 (1993) ..... *passim*

Voter Registration: Hearings Before the Subcomm. on Elections of the H. Comm. on H. Admin., 100th Cong. (1988) 17, 19, 21

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Page(s)

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Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000) 7, 8, 16

J. Morgan Kousser, *Colorblind Injustice* (1999) 8

J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of One-Party South, 1880-1910* (1974) 7

Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277 (1993) 13

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Page(s)

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John F. Reynolds, *Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920* (1988) 8

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O. Douglas Weeks, *Permanent Registration of Voters in the United States*, 14 Temp. L.Q. 74 (1939) 10, 11

Leonard D. White, *Public Administration, 1927*, 22 Am. Pol. Sci. Rev. 339 (1928) 10

INTERESTS OF *AMICUS CURIAE*[1]

Amici curiae are professors who focus their academic research and teachings on American history, and in particular voting rights and elections. *Amici* bring their objective expertise to this case and have no personal stake in its outcome. As students and teachers of history, *amici* believe that Petitioner's arguments are wrong in part because they are profoundly ahistorical. This Court has aptly observed on a number of occasions that "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), and this case is no exception. *Amici* submit this brief to describe the history of state laws that purged the names of voters from voter registration lists because those people failed to vote—from their rise in the early twentieth century to their ultimate and absolute rejection by Congress when it passed the National Voter Registration Act of 1993.[2]

The scholars joining this brief include:

- Orville Vernon Burton, Professor of History, Clemson University.

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for any party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

This case is about voting, a right "at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The franchise has expanded throughout our history via constitutional amendments and federal legislation, as well as shifting norms and attitudes. *See id.* at 555 & n.28. Even so, elections too often are marred by low voter turnout, a problem exacerbated by state practices that burden registration and reduce access to the polls. In this case, Petitioner, the Ohio Secretary of State, defends one such practice. Ohio's Supplemental Process automatically cancels the registration of everyone who has not voted in two years and then fails to respond to a single notice and vote in the ensuing four years. Purging residents in this way for exercising their right *not* to vote violates federal law, regardless of whether the State provides notice and an opportunity to challenge removal. Respondents explain why that is so under the plain text of the relevant statute. *Amici* agree and seek here to place that text in its historical context. The Court should reject Petitioner's contrary revisionist history and affirm the Sixth Circuit's decision below.

In the early twentieth century, state and local governments increasingly began purging the names of citizens who failed to vote as an imprecise but inexpensive way to keep voter rolls accurate. Substantial "dead wood" on voter rolls, the theory went, made for inaccurate registration lists that might enable the likes of Tammany Hall to pad votes. The working assumption behind these purging practices was that people who did not vote in a jurisdiction failed to do so because they had lost their voting eligibility in that jurisdiction—perhaps they moved away, died, or

were convicted of a crime. And even if that assumption proved incorrect in any particular case (*i.e.*, the person in fact remained eligible to vote in that jurisdiction), proponents asserted that the affected person could either prevent the purge from going into effect (assuming that the person received advance notice) or reregister (assuming that the person understood reregistration was an option). None of that is to say that these purges were innocent—historians like *amici* have since found that in many cases registration systems and purging practices had both the intent and effect of disfranchising voters, particularly African-American voters. Nevertheless, many States agreed with the early proponents of these laws and adopted purging for non-voting as a quick-and-easy method to clean up voter registration lists. But over time even once-proponents of purging for failure to vote came to see the shortcomings of this practice, and Congress ultimately banned the practice entirely.

Mounting experience with these purging practices generated concerns about their efficacy and fairness. Many who studied the causes of low voter turnout in the United States concluded that cumbersome state registration laws—including purging for non-voting—were among the primary culprits. Critics also cited evidence showing that these laws disproportionately impacted poor and minority voters. Courts joined the fray as well. The Michigan Supreme Court, for example, questioned the logic of using failure to vote as a proxy for voter ineligibility when the "absence of baby-sitters" or the conscious exercise of the *right not to vote* were equally plausible explanations for someone sitting out an election. *Michigan State UAW Cmty. Action Program Council (CAP) v. Austin*, 198 N.W.2d

385, 388 (Mich. 1972). And the Fifth Circuit exposed a dark underbelly of the practice in a case where a local election official violated federal law by applying Louisiana's purge process in a racially discriminatory manner against African Americans. *Toney v. White*, 476 F.2d 203, 205-06, 208 (5th Cir.), *vacated in part on reh'g en banc*, 488 F.2d 310 (5th Cir. 1973).

In the late 1980s, Congress addressed concerns over state laws that purged registrants for non-voting when it tackled comprehensive voting rights and election law reform. Over the course of several years of hearings, Congress heard from numerous groups about the need to reform the complex maze of state and local voter registration laws to increase citizen participation in the voting process. At the same time, state and local officials testified about their legitimate need to maintain accurate voter registration lists.

The result was the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 ("NVRA"), which struck a balance between these competing interests. This balance came out against the continued use of purge laws based on failure to vote—regardless of whether the laws allowed for extended time periods to measure non-voting and regardless of whether they provided notice and an opportunity to challenge before an individual was removed from a registration list. Congress recognized that purging for non-voting was a relatively common practice, and that States had a legitimate interest in maintaining accurate voter registration lists. Congress simply decided that a person's failure to vote should not be used to achieve that goal. Congress directed States instead to use more precise and less discriminatory methods for identifying ineligible voters, including the National

Change of Address program available through the U.S. Post Office.

Amici are not alone in this understanding of the text and purpose of the NVRA. The United States had—and over two decades consistently advocated—precisely the same understanding, from the moment Congress passed the NVRA until this late stage of this case. That understanding of the NVRA was, and remains today, correct, the Government's recent about-face notwithstanding.

That understanding, moreover, has not been superseded legislatively. When Congress passed the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 ("HAVA"), it did not resurrect the ability of States to purge voters who failed to vote. To the contrary, Congress explicitly intended that HAVA "leave[] NVRA intact, and ... *not undermine it any way*." H.R. Rep. No. 107-730, at 81 (2002) (Conf. Rep.) (emphasis added).

ARGUMENT

I. Purging For Non-Voting Was Justified As A Measure To Keep Accurate Voter Rolls, But The Practice Raised Profound Concerns

State and local barriers to voting have taken many forms over time. In innumerable well-documented cases, state and local officials created flagrant obstacles to voting designed to disenfranchise minority groups, particularly African Americans. Congress admirably fought against those obstacles through numerous pieces of federal legislation, most notably the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 308-15 (1966).

The practice of purging for non-voting was not always driven by any overtly discriminatory animus. As Petitioner recounts, these and other purge practices emerged as a means to maintain accurate rolls when States and municipalities shifted away from periodic voter registration systems to permanent voter registration systems in the early 1900s. *See* Pet'r Br. 3 (citing National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* 28 (Aug. 2001), http://web1.millercenter.org/commissions/comm_2001.pdf).

But that is only part of the story. Petitioner ignores the evidence that in many cases these voter registration systems themselves also "served—and often were intended to serve—as a means of keeping African-American, working-class, immigrant, and poor voters from the polls." Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 312 (2000); *see also* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 7, 10 (Bernard Gofman & Chandler Davidson eds., 1992) (describing "statutory suffrage restrictions" as a means to disfranchise African Americans); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of One-Party South, 1880-1910* at 47-50 (1974) (describing registration laws, and particularly the discretion afforded to registrars, as a means for disfranchising African-American voters); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 457 (2008) ("There was often an ulterior motive for these laws as well, namely to impede the participation of groups that those

running elections wanted to exclude."). "[T]he devil was in the details," Keyssar, *supra*, at 312, and purging often was driven by discriminatory animus and had discriminatory effects. *See* J. Morgan Kousser, *Colorblind Injustice* 34 (1999) (describing purging as a practice used to "keep[] the black vote under control" in the nineteenth century); John F. Reynolds, *Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920* at 142, 146 (1988) (discussing a 1911 New Jersey law that, among other things, required voters who missed an election to reregister and reportedly led to 800 of Trenton's 1,000 black voters being removed from the registry).

In any event, the shift to permanent registration systems certainly created a perceived need to clean voter registration lists of the names of individuals no longer eligible to vote in that jurisdiction. *See* Joseph P. Harris, *A Model Registration System: Report of the Committee on Election Administration of the National Municipal League*, Supplement to National Municipal Review 7 (1931) ("Nat'l Mun. League 1931 ed."); *see also* Joseph P. Harris, *Legislative Notes and Reviews*, 22 Am. Pol. Sci. Rev. 349, 349 (1928). Otherwise, any benefits in efficiency and convenience resulting from permanent registration systems could be substantially offset by inaccurate voter rolls and a generalized fear of voter fraud by political machines. Nat'l Mun. League 1931 ed., at 37-38; Harris, *Legislative Notes*, *supra*, at 349-51.

The question therefore became how to achieve most effectively the goal of bona fide voter registration lists. In 1927, the National Municipal League published *A Model Registration System*, a report that provided "best" practices already in use in some jurisdictions

that, at least according to the National Municipal League, other States and cities should adopt. Joseph P. Harris, *A Model Registration System: Report of the Committee on Election Administration of the National Municipal League*, *in* Supplement to National Municipal Review 45-48, 77-83 (Jan. 1927) ("Nat'l Mun. League 1927 ed."). In Boston, for example, the local police conducted a census of adult residents and compared the results to registration records. *Id.* at 78, 80-81. Death reports were another "very practical and effective means" of keeping voter registration lists current. *Id.* at 78.

Among these "best" practices, the National Municipal League recommended that a person's failure to vote in recent elections should be used as a basis for removing ineligible individuals from voter registration lists. *Id.* at 78-79. Cities like Denver, Colorado and Portland, Oregon, for instance, depended exclusively on this method to the exclusion of all others because of its certain effectiveness in identifying every voter who died or moved away. *Id.* at 79; Joseph P. Harris, *Registration of Voters in the United States* 225-26 (1929) ("Other methods fail to catch some electors who have died or moved away, but all are caught by a system of cancellation for failure to vote."). Because of their efficiency, the National Municipal League advocated for the adoption of practices like these that purged those who failed to vote in a one- or two-year period, or in a general election, provided the voters received notice and an opportunity to seek reinstatement. Nat'l Mun. League 1927 ed., at 78-79. Such measures, in the National Municipal League's view, "place[d] a mild penalty upon non-voting and

thereby stimulate[d] voting," and would "not greatly inconvenience[]" those who failed to vote. *Id.* at 79.

Bills inspired by the National Municipal League's recommendations were introduced in seven States immediately thereafter. *See* Leonard D. White, *Public Administration, 1927*, 22 Am. Pol. Sci. Rev. 339, 344 (1928) (describing the National Municipal League's model registration system as the "most important event in this field during 1927"); Harris, *Legislative Notes*, *supra*, at 352. By 1939, twenty States had laws on the books mirroring all or part of the *Model Registration System*, *see* O. Douglas Weeks, *Permanent Registration of Voters in the United States*, 14 Temp. L.Q. 74, 75-76 (1939), and by the 1970s, fully thirty-eight States plus the District of Columbia purged citizens from voter registration lists based on failure to vote. *See* Arnold I. Menchel, *Election Laws: The Purge for Failure to Vote*, 7 Conn. L. Rev. 372, 373-78 (1975); *see also* Joseph P. Harris, National Municipal League, *Model Voter Registration System* 44 (4th ed. 1954 & rev. 1957) ("Cancellation for failure to vote is the principal means used in most permanent registration jurisdictions to purge the lists.").

Each of these laws permitted cancellation of registrations for failure to vote, though they differed in certain respects, most notably (1) the time period used to track a person's voting inactivity, and (2) the notice (or lack thereof) provided to a person whose name had been or would be purged. *See* Weeks, *supra*, at 84-85; Menchel, *supra*, at 373-78. Some laws considered a failure to vote within two years; others four years or more; some laws provided no notice; others provided notice with a limited window to challenge removal or seek reinstatement, and yet another provided multiple

notices before purging went into effect. *See* Weeks, *supra*, at 84-85; Menchel, *supra*, at 373-78. In all cases, people could reregister if their names were purged from the voter registration lists. *See* Harris, *Registration of Voters*, *supra*, at 224-25; Menchel, *supra*, at 376-77.

But as these laws took hold, questions emerged about their wisdom. Voter participation rates in the United States lagged well behind those in other developed democracies. *See Report of the President's Commission on Registration and Voting Participation* 7-9(1963) ("*1963 Report*"). Groups that studied the voter participation problem, like the President's Commission on Registration and Voting in 1963, blamed "[r]estrictive legal and administrative procedures in registration and voting [that] disfranchise millions." *Id.* at 1. The Commission highlighted the fundamental unfairness that results when "[a]n unexpected business trip or a broken ankle can deprive a citizen of his right to vote," and when that failure to vote two years ago means the person "cannot vote now." *Id.* at 11.

The National Municipal League voiced similar concerns in 1973. National Municipal League, *A Model Election System* 1 (1973) ("Nat'l Mun. League 1973 ed.") ("[T]he problem of non-voting in America is directly related to the machinery states have created for registering voters and administering elections."). "Frequent purges will result in more current and accurate lists," the National Municipal League explained, "but they also increase the volume of registrations that officials must process and may seriously inconvenience voters. What the system

confers at one point, it often takes away later." *Id.* at 24.

Both the President's Commission on Registration and Voting and the National Municipal League agreed that States should never cancel a person's registration for failure to vote for any period less than four years, if they did so at all. *See 1963 Report* 37; Nat'l Mun. League 1973 ed., at 33. Indeed, the National Municipal League went so far as to call laws with shorter non-voting periods "discriminatory and undesirable" because they disproportionately affected the large number of people who voted only in presidential elections. Nat'l Mun. League 1973 ed., at 33. The National Municipal League more generally described cancellation for non-voting as a flaw of permanent registration systems that required citizens to constantly reregister and thus called into question their "permanent" label—a stark shift from its previous longstanding support for aggressive purging. *Compare id.* at 4, *with* Nat'l Mun. League 1931 ed., at 38-39. The National Municipal League now recommended that States primarily use door-to-door canvassing, not purging for non-voting, to keep registration lists clean. Nat'l Mun. League 1973 ed. at 24-34 (recommending voter purge laws based on inactivity only for "States which do not implement a door-to-door canvassing system").

Critics also questioned the core assumption underlying purging for non-voting—that a person's failure to vote was a reliable indicator of their ineligibility to vote. *See* Menchel, *supra*, at 373, 393; Steve Barber et al., *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-C.L. L. Rev. 483, 508 (1988). According to these

critics, that assumption had little validity in States that purged the names of voters who merely failed to vote for two years or in one general election. *See* Menchel, *supra*, at 373. The assumption also lost persuasive force in States that gave voters inadequate notice before their registrations were cancelled. In Missouri, for example, residents of St. Louis County who received a notice were not told they had the right to reregister if they failed to challenge the purge within twenty days, but residents of Jackson County were. *Id.* at 375; *see also* Barber, *supra*, at 501.

Critics further pointed out that the poor and minority groups were disproportionately affected by these purges both because they voted less frequently and because they had greater difficulty navigating reregistration once their registrations were purged. *See* Barber, *supra*, at 491-92 (discussing a statistical study of voters in Arizona showing that Mexican Americans turned out less frequently in midterm elections and concluding they would be disproportionately impacted by a two-year purge for failure to vote); Menchel, *supra*, at 392 ("The lower the level of education, the more likely the voter will be, or view himself as being, unable to register."); *see also* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277, 1327-28 (1993) ("[P]eople who are literally struggling to find enough to eat are highly unlikely to participate in the political process. . . . The politically quiescent attitude of the poor, therefore, is less a matter of free choice, than of the mutually reinforcing effects of low resources, weak political incentives, and inadequate skills that trap the poor in . . . a cycle of defeat." (citations and internal quotation marks omitted)).

Litigants and judges hashed out these questions, too. Challengers argued that these purge laws were invalid under the U.S. and applicable state constitutions. Courts often disagreed, holding that the laws reasonably related to the legitimate state interest of preventing voter fraud. *See, e.g., Simms v. Cty. Ct.*, 61 S.E.2d 849, 851-54 (W. Va. 1950); *Citizens' Comm. for the Recall of Jack Williams v. Marston*, 507 P.2d 113, 116-17 (Ariz. 1973); *Duprey v. Anderson*, 518 P.2d 807, 810-11 (Colo. 1974); *see also Hoffman v. Maryland*, 928 F.2d 646, 648-49 (4th Cir. 1991) (upholding Maryland's voter purge statute).

But in some cases, judges identified critical weaknesses in these laws. In *Michigan State UAW Community Action Program Council (CAP) v. Austin*, the Michigan Supreme Court struck down that State's purge law with a two-year voting inactivity trigger because the law affected the right to vote protected by the Michigan Constitution and lacked a compelling government interest. *See* 198 N.W.2d 385, 390 (Mich. 1972); *see also* Menchel, *supra*, at 381-82. In doing so, the court questioned the validity of using a person's failure to vote as a proxy for identifying ineligible voters because so many other explanations existed for non-voting, "including illness, travel, absence of baby-sitters, or a conscious protest against all of the candidates in a particular election." *Michigan State UAW*, 198 N.W.2d at 388. That logical flaw had profound real-world consequences given the sheer number of registrations purged under the Michigan law. From 1960 to 1970, *over 600,000* registrations were cancelled for non-voting in the city of Detroit alone. *Id.*

The Fifth Circuit confronted a different problem in *Toney v. White*. *See* 476 F.2d 203 (5th Cir. 1973), *vacated in part on reh'g en banc*, 488 F.2d 310 (5th Cir. 1973); *see also* Menchel, *supra*, at 386. There, a local registrar had discriminated against African-American voters by publishing a notice that 141 voters' names would be purged for non-voting without informing the named individuals of their right under Louisiana law to appear before the registrar and prove their right to remain registered. *Toney*, 476 F.2d at 205-07. Of the 141 affected voters, 130 were African American. *Id.* at 206. The court concluded that this, along with other discriminatory actions, violated the Fifteenth Amendment and the Voting Rights Act. *Id.* at 208.

Even the divided decision of a three-judge district court in *Williams v. Osser* that upheld purging for non-voting exposed significant problems with these laws. *See* 350 F. Supp. 646 (E.D. Pa. 1972); *see also* Menchel, *supra*, at 383-85. In *Williams*, the challengers of Pennsylvania's purge law presented uncontested and statistically valid evidence showing that 58.5% of people removed from voter rolls for non-voting had not actually moved, been convicted of a felony, or died and were thus eligible to vote. 350 F. Supp. at 649-50. Worse yet, fewer than half of those people took action to reregister after they were purged. *Id.* The court nevertheless upheld the Pennsylvania law because it concluded the law was rationally related to the state interest of preventing voter fraud and, in the court's view, imposed only a "minimal" burden on voters. *Id.* at 653. Viewing the statistical evidence, a dissenting judge concluded that "[i]t is quite clear . . . that non-voting for two years is not a valid indicator of non-residence" and would have found the law

unconstitutional under a more demanding level of scrutiny. *Id.* at 654-55 (Luongo, J. dissenting).

So matters stood in the late 1980s, when American voter turnout hit historical lows. Voter participation in the 1986 midterm elections fell to its lowest in over four decades, with 112,000,000 eligible citizens failing to vote. *See* Committee for the Study of the American. Electorate, *Creating the Opportunity: How Voting Laws Affect Voter Turnout* 3 (Oct. 1987). The Committee for the Study of the American Electorate, a nonprofit and nonpartisan group guided by public officials and scholars, published a report raising the alarm about the "appalling and embarrassing" voter turnout figures that illustrated "a growing crisis for American democracy." *See id.* at 3; *id.* at 5 ("Simply and bluntly, government of, for and by the people is in danger of becoming government of, for and by the few."). The Committee did not mince words when it came to purges based on voter inactivity. It found this practice was "a major impediment to voting" and concluded that ending the practice would substantially enhance voter turnout. *See id.* at 77, 86-87.

By this point, forty States and the District of Columbia had laws on the books that purged individuals for non-voting, *see* Barber, *supra*, at 499, and concerns about low voter participation, caused at least in part by these purging laws, abounded. *See Creating the Opportunity*, *supra*, at 77, 86-87; *cf.* Keyssar, *supra*, at 312-13.

II. Congress Acted To End The Practice Of Purging Citizens From Registration Lists For Non-Voting When It Passed The NVRA

The dismal voter turnout to the 1988 presidential elections spurred Congress into action. *See* S. Rep. No.

101-140, at 4 (1989). By the late 1980s, Congress had considered an array of potential federal legislation aimed at increasing the number of eligible citizens registered to vote. *See, e.g.*, H.R. Rep. No. 101-243 (1989); S. Rep. No. 101-140. Congress appreciated that because the "failure to become registered is the primary reason given by eligible citizens for not voting," making registration more accessible was critical to increasing voter participation. *See, e.g.*, H.R. Rep. No. 103-9, at 3 (1993); *see also* S. Rep. No. 103-6, at 2 (1993). At the same time, Congress recognized that any new federal legislation should "minimiz[e] potential new problems for State and local election officials," *Voter Registration: Hearings Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 100th Cong. 32 (1988) (hereinafter *1988 Hearings*) (statement of Rep. Swift), "protect the integrity of the political process," and "assure an accurate and current voter registration roll," S. Rep. No. 103-6, at 1. Congress's legislative efforts to achieve these sometimes-competing goals culminated in the NVRA.

Congress's first stated goal in passing the NVRA was to "increase the number of eligible citizens who register to vote in elections for Federal office." *See* 52 U.S.C. § 20501(b)(1). It aimed to accomplish this on the front end by reforming state voter registration processes to reduce government-imposed barriers to registration. *See e.g.*, H.R. Rep. No. 103-9, at 3; *see also* 52 U.S.C. §§ 20504-20506 (requiring that States allow citizens to register to vote simultaneously with a driver's license application, by mail, and in person). At the same time, Congress recognized that, on the back end, some of the methods States were using to

maintain voter rolls were stripping eligible voters from registration lists, often in a discriminatory fashion. *See* H.R. Rep. No. 103-9, at 5, 15; S. Rep. No. 103-6, at 3, 17-18. In particular, testimony and evidence presented to Congress confirmed that laws that purged individuals based on their failure to vote were likely to remove eligible voters from voter registration lists, directly frustrating Congress's commitment to increase voter registration numbers.

To address that problem, Congress included in the NVRA an express provision prohibiting state practices that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). Having recognized that a person's failure to vote is not a fair or accurate proxy for voter ineligibility, Congress required a State to obtain some other, independent evidence suggesting that a voter was ineligible prior to taking steps to purge a particular voter. The Act's text, history, and purpose establish that Congress intended to eliminate purge practices triggered by a failure to vote.

A. Congress Was Concerned Over The Effect Of Non-Voter Purges On Voter Participation

The legislative history of the NVRA echoes the very same concerns about fairness and efficacy that critics of voter-inactivity purges had been raising for decades. When considering the various bills that eventually resulted in the NVRA, Congress carefully weighed evidence that state purges of non-voters too often resulted in the removal of *eligible* voters from registration lists, thereby improperly reducing the

number of voters able to vote in a given election. *See, e.g., 1988 Hearings*, at 285, 306, 379-80 (*Creating the Opportunity, supra*). Central to this issue was the question of whether an individual's failure to vote was reliable evidence that the voter had moved, died, or otherwise become ineligible to vote.

Evidence and testimony presented to Congress established the important (if unremarkable) fact that an individual's failure to vote often was explained by a number of reasons that had nothing at all to do with their continued eligibility to vote. The League of Women Voters, for example, provided the House Subcommittee on Elections with a litany of reasons why a voter might decline to vote in a given election, which included "lack of interest in or confusion about a particular election, disbelief that the issues presented will adequately represent one's concerns or that the candidates are worthy of one's support, inaccessibility of the polling place, absence, emergency, [and] health." *Voter Registration: Hearings Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 101st Cong. 149 (1989) (hereinafter *1989 Hearings*) (statement of Nancy M. Neuman, President, League of Women Voters of the United States); *see also e.g., id.* at 49 (statement of Rep. John Conyers, Jr.) (explaining that "there are many reasons non-voters do not participate: some are apathetic; some feel that existing choices do not offer answers; others do not feel their vote will make a difference").

In addition, a report submitted to Congress by the Citizens' Commission on Civil Rights indicated that "the pool of non-voters who make *conscious decisions not to vote* for a number of reasons ... has grown dramatically since the 1960s." *1988 Hearings*, at 51

("Barriers to Registration and Voting: An Agenda for Reform") (emphasis added). The Reverend Jesse Jackson remarked upon the fundamentally undemocratic nature of purging such conscious objectors on the basis of their failure to vote, noting that "[n]o other rights guaranteed to citizens are bound to the constant exercise of that right." *1989 Hearings*, at 135 (testimony of Rev. Jesse Jackson, President, National Rainbow Coalition). Mr. Jackson explained: "We do not lose our right to free speech because we do not speak out on every issue. By the same token, we should not lose our right to vote because of our refusal to vote in any particular election." *Id.* Congress agreed:

> [W]hile voting is a right, people have an equal right not to vote, for whatever reason. However, many States continue to penalize such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election. Such citizens may not have moved or died or committed a felony. Their only "crime" was not to have voted in a recent election.

S. Rep. No. 103-6, at 17.

The many possible alternative explanations for an individual's failure to vote thus called into question both the wisdom and the suppressive effect of using an individual's non-voting status as evidence that the voter may have moved, passed away, or otherwise become ineligible to vote. The Committee for the Study of the American Electorate presented evidence to Congress demonstrating that the state practice of using inactivity as a proxy for ineligibility "ha[d] a

serious negative effect on turnout" because it eliminated as many as *two million individuals* from voter rolls who would otherwise have been eligible to vote. *1988 Hearings*, at 306 (*Creating the Opportunity, supra*). The Committee therefore recommended that "in pursuing their legitimate responsibilities to provide accurate voting lists, [States] should seek other methods to cleanse the lists of those who have died or moved." *Id.*

The NVRA's legislative history also reveals concerns that non-voting purges might disproportionately affect minority voters. Congress understood that, historically, "selective purges" were akin to the "poll tax[es], literacy tests, [and] residency requirements" that state and local jurisdictions had used to "discourage [the] participation" of minorities in the electoral process throughout the nineteenth and early twentieth century. H.R. Rep. No. 103-9, at 2-3; *see also* S. Rep. No. 103-6, at 3. Though Congress appreciated that contemporary state purge practices were not likely fueled by the same discriminatory animus as their historical predecessors, Congress recognized that purges for non-voting could continue to "disproportionately affect persons of low incomes, and blacks and other minorities." *See* S. Rep. No. 103-6, at 17-18.

Congressional testimony confirmed that state registration laws were "not uniform," "not nondiscriminatory" and, in some cases, were "interpreted in such a manner as to deny eligible citizens their right to vote." H.R. Rep. No. 103-9, at 4. In particular, a number of interest groups voiced specific concerns about the impact of state non-voter purge laws on minority participation in the democratic

process. For example, the NAACP testified before Congress that "there should be *no* non-voting purges" because "[i]n many instances of non-voting purges blacks are disproportionately purged because of their infrequency of voting." *1989 Hearings*, at 153 (statement of Althea T.L. Simmons, Director, Washington Bureau, NAACP); *see also id.* at 154 (testimony of Pamela Monroe Young, Legal Director, NAACP).

The League of Women voters similarly expressed "concern[] about 'purging' procedures used in many states, especially those that automatically remove voters' names from the list for not voting in a specified number of elections." *Id.* at 149 (statement of Nancy M. Neuman). The League noted that in New York City 350,000 names were removed from the lists for non-voting before the April 1988 presidential primary, "effectively negating the accomplishments of a city-wide voter registration drive that had added 350,000 new names to the rolls." *Id.* And another 312,000 people were sent purge notices in February of 1989. *Id.* The League strongly urged that "no voter's name should be removed from the list of registered voters for not voting." *Id.*

In sum, the legislative history of the NVRA reflects serious and pervasive concerns—raised both by those testifying before Congress and by Congress itself—about the propriety of removing citizens from voter rolls based on their failure to vote. Congress understood that the continued use of that practice contributed to the substantial voter turnout problem in the United States, particularly among African Americans and other minority groups.

B. Congress Prohibited States From Considering Non-Voting In A Registrant Removal Process Except To Confirm Independent Evidence Of Voter Ineligibility

In light of these concerns, Congress included in the NVRA an express prohibition against state practices that "*result in the removal of the name of any person* from the official list of voters registered to vote in an election for Federal office *by reason of the person's failure to vote.*" 52 U.S.C. § 20507(b)(2) (emphasis added) ("Failure-to-Vote Clause"). Ohio's Supplemental Process violates that prohibition. Under the Supplemental Process, if an Ohio resident fails to vote in a single election cycle, they are sent a notice requesting their response. *See* Pet'r Br. 11. If the voter does not respond to that solitary notice and does not vote within the next four years, their voter registration is canceled. *Id.* Any such process that can "result" in a voter being removed from the from Ohio's voter rolls "by reason of [their] failure to vote," is impermissible under the NVRA. *See* 52 U.S.C. § 20507(b)(2).

Petitioner argues that the Supplemental Process does not violate the NVRA because it only prohibits States from "removing" registrants on the basis of their failure to vote—*i.e.*, that it does not prohibit States from using the failure to vote as a "trigger[]" for a notice-confirmation process. *See* Pet'r Br. 25-26. The NVRA makes no such distinction. To the contrary, the text broadly prohibits "*[a]ny state program or activity*" that "*result[s] in*" purging "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added). The trigger for non-voting is itself a

"program or activity" that "results in" purging for non-voting and thus falls under the NVRA's prohibition.

The legislative history confirms that this statutory prohibition applies to the entire voter-removal process, from start to finish. In addition to subsection (b)(2)'s prohibition against any "program or activity" used to regulate voter registration rolls that results in purging individuals for their failure to vote, Section 8(b) includes—at subsection (b)(1)—an affirmative requirement that such "program[s] or activit[ies]" must "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." *Id.* § 20507(b)(1). The House Report explains that "the intent of this section [is] to impose the uniform, nondiscriminatory and conforming with the Voting Rights Act standards on any activity *that is used to start, or has the effect of starting, a purge of the voter rolls*, without regard to how it is described or to whether it also may have some other purpose." H.R. Rep. No. 103-9, at 15 (emphasis added); *see also* S. Rep. No. 103-6, at 32 (same); *id.* at 19, 32 (explaining that use of address change information from the National Change of Address Program as a "trigger" is uniform and nondiscriminatory). Subsection b(1) therefore regulates every chronological step in a State's voter removal process, including the "*activity that is used to start, or has the effect of starting, a purge*"—*i.e.*, the "trigger." H.R. Rep. No. 103-9, at 15 (emphasis added). Nothing in the NVRA or its legislative history suggests that Congress intended the Failure-to-Vote Clause in subsection (b)(2)—which applies to the very same "program[s] and activit[ies]"—to have a narrower scope.

Nor would excluding triggering rules from the prohibition against purging for nonvoting be sensible: Given the low voter participation rates in the United States, voter inactivity would be a "trigger" pulled with great regularity. Widespread use of voter inactivity as a trigger by States to initiate notice-confirmation processes would in turn result in broad swaths of Americans being mailed purge notices. And whether a significant proportion of the American electorate remain on the voter rolls would then hinge on whether or not registrants respond to those notices.

In addition, the process the NVRA authorizes for removing voters who have moved out of jurisdiction suggests that the only lawful "trigger" for a notice-confirmation removal process is reliable evidence of voter ineligibility. NVRA Sections 8(c) and 8(d), taken together, detail a safe-harbor method that States can use to identify and subsequently purge voters who may no longer live in an applicable jurisdiction. *See* 52 U.S.C. § 20507(c)-(d). These provisions illustrate Congress's intent that States obtain independent evidence of voter ineligibility—separate and apart from a registrant's failure to vote—prior to initiating a voter purge notice-confirmation process.

Subsection (c) provides that a State seeking to purge its voter registration lists of non-residents may begin by consulting the U.S. Postal Services' National Change of Address ("NCOA") system in order to determine whether a voter has changed his or her address to a location outside of the jurisdiction. *See id.* § 20507(c); H.R. Rep. No. 103-9 at 15. The House Report explains that

> [i]n order to provide some guidance to the States, subsection (c) provides that a

> State may meet the requirements of conducting a general program that makes a reasonable effort to keep voting lists clean by establishing a program which uses the [NCOA] program of the U.S. Postal Service. Use of the NCOA program by a State or any of its registration jurisdictions could be deemed to be in compliance with the requirements that the program be uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965.

H.R. Rep. No. 103-9, at 15. Although use of the NCOA is not mandatory, Congress envisioned that States would use it, or some other "reasonable program," to obtain evidence of voter ineligibility prior to beginning a voter removal process. *See* S. Rep. No. 103-6, at 19, 32. For example, States may opt instead to use mailings that are returned as undeliverable as objective evidence of voter ineligibility.

Once evidence that a registrant may have moved has been obtained, the NVRA requires a State to use the notice-confirmation procedures outlined in Section 8(d) to *confirm* that change of address. Section (d)(1) provides that a State may purge an individual from a voter registration list only (1) after a registrant "confirms in writing" that he or she has changed residence to a place outside the registrar's jurisdiction"; or (2) once the registrant fails to respond to an address confirmation notice and fails to vote during the next two Federal election cycles. *See* 52 U.S.C. § 20507(d)(1). Congress's use of the word "confirm" further suggests that Congress intended that States obtain evidence of a change in residence

prior to initiating a notice-confirmation process that might result in the removal of the registrant.

The legislative history of the NVRA substantiates this view. Congress was unambiguous in in its reports that removal should be predicated on a voter's ineligibility. The Senate Report explains, for example, that "[t]he Act allows the removal of a person's name from the official list by reason of a change of residence outside the jurisdiction of the registrar," and that notice could be sent only "[i]f a State determines that a registrant may have changed residence." S. Rep. No. 103-6, at 19, 32-33. More broadly, the NVRA was designed to "assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction." *Id.* at 2. As discussed in Section II.A, *supra*, Congress understood that, given the myriad alternative reasons why an individual might fail to vote, voter inactivity is not a dependable proxy for voter ineligibility. Viewed in that context, the legislative history strongly suggests that a voter removal procedure can be lawfully triggered only by particularized evidence of "a change of residence" (or some other evidence of voter ineligibility)—a failure to vote alone is not sufficient.

III. The Department Of Justice Historically Interpreted The NVRA As Prohibiting Purge Practices Like Ohio's Supplemental Process

Immediately after Congress passed the NVRA, the Department of Justice went to work enforcing its provisions. And in the course of those enforcement efforts, the Department of Justice interpreted the

NVRA as prohibiting all forms of purging for non-voting, even in cases when voters received notice before the purge went into effect. In 1994, for example, Assistant Attorney General of the Department of Justice Civil Rights Division Deval Patrick wrote to the Senior Assistant Attorney General of Georgia objecting to Georgia's procedure of sending a registration confirmation notice to registered voters who failed to vote or otherwise contact election officials for three years. *See* Br. for the United States ("United States Sixth Cir. Br.") Attachment 2 at 1-2, *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016), (No. 16-3746), 2016 WL 3923034. Including such people in Georgia's purge procedures "*is directly contrary to the language and purpose of the NVRA*," the Department of Justice wrote, "and is likely to have a disproportionate adverse effect on minority voters in the state." *Id.* at 2 (emphasis added). Allowing such purges to continue would "eliminate certain of the gains to minority voters mandated by Congress in enacting the NVRA and, accordingly, 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* (citation omitted).

In the same vein, in 1996 the Department of Justice challenged a Pennsylvania purge law that used a person's failure to vote within five years as a trigger to send the person a notice, which resulted in the person's removal from registration lists if they failed to return the notice or vote in the two subsequent general elections. United States Sixth Cir. Br. Attachment 3, at 14-18. The Department explained that "[t]he NVRA was designed to render superfluous the need for large scale purges and list cleaning systems such as

Pennsylvania's purge for non-voting" through its provision of alternative means of identifying voters who changed residences. *Id.* at 17. According to the Department, Congress decided that "non-voting can not be used as a proxy for ineligibility." *Id.* at 18 n.23. And the Department correctly recognized that Congress even meant to ban *all* purges based on non-voting, no matter how apparently reasonable, such as a law that only purged voters who failed to vote for the previous 100 years. *Id.* As the Department explained, "Congress embodied in the statute its determination that any marginal benefit which might result from permitting the use of non-voting was outweighed by the burden on individuals' rights not to vote and the disparate systemic impact such a rule tends to have on minorities and the poor." *Id.* at 19 n.23.

The list of cases in which the Department of Justice advanced this understanding goes on and on. *See* United States Sixth Cir. Br. at 2-3 (discussing other instances when the Department of Justice challenged provisions similar to Ohio's Supplemental Process); *see also* Federal Election Commission, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996* at 5-22 (Mar. 1998) (describing the Department of Justice's objections to Georgia and South Dakota measures that targeted individuals to receive confirmation notices because they had failed to vote in preceding elections).

None of this is to say that the Court owes deference to the Department of Justice's prior interpretations of the NVRA; it does not. *See Gonzales v. Oregon*, 546 U.S. 243, 264 (2006). But the executive branch's consistent interpretation of the NVRA for more than

two decades and over three different presidential administrations, from its inception up until this final stage of this case, casts doubt about its sudden about-face.

IV. HAVA Does Not Supersede The NVRA's Prohibition On Non-Voter Purge Practices

In the aftermath of the disputed 2000 presidential election, Congress sought to "improve our country's election system." H.R. Rep. No. 107-329, pt. 1, at 31 (2001). Nothing suggests that in so doing it intended to affect in any way the scope or meaning of the NVRA's prohibition against non-voter purges. To the contrary, Congress expressly provided that HAVA is not to "be construed to authorize or require conduct prohibited under ... or to supersede, restrict, or limit the application of ... [the NVRA]." 52 U.S.C. § 21145(a)(4).

Petitioner points to the provision HAVA added to the Failure-to-Vote Clause stating that "nothing in [the Failure-to-Vote Clause] may be construed to prohibit a State from using the [notice-confirmation procedures outlined in Section 8(d)]" to remove registrants from voter rolls, and argues that this confirms the legality of non-voter purge practices like Ohio's, which engage in a notice-confirmation procedure prior to removing a registrant. *See* Pet'r Br. 36 (quoting 52 U.S.C. § 20507(b)(2)). It confirms no such thing. The far more reasonable interpretation is that this merely clarifies that use of the statutorily mandated procedure for *confirming* independent indicators of ineligibility does not constitute a practice that unlawfully purges for non-voting.

Petitioner further contends that HAVA's requirement that States keep and maintain statewide

registration lists counsels in favor of Ohio's Supplemental Process. Pet'r Br. 38-39. HAVA provides that "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of failure to vote." 52 U.S.C. § 21083(a)(4)(A) (emphasis added). But under this process, "[i]f individuals are to be removed from the computerized list, they shall be removed in accordance with the provisions of NVRA." H.R. Rep. No. 107-730, at 75 (2002) (Conf. Rep.). Again, Congress provided explicitly that it did not intend for HAVA to supersede the voter removal processes mandated by the NVRA. And for the reasons articulated in Section II.B, *supra*, Ohio's Supplemental Process is *not* "in accordance with" the provisions of the NVRA.

From the outset, the Department of Justice shared this post-HAVA understanding of the NVRA. In 2007, for example, the Department agreed to a consent judgment with local officials in New Mexico mandating that the county "shall only place the name of any voter on an inactive list based on objective information indicating that the voter has become ineligible to vote due to having moved, such as returned mail with no forwarding address or National Change of Address program data showing a move outside the County." United States Sixth Cir. Br. Attachment 7 at 9 ¶ 13. And in 2010—under yet another presidential administration—the Department of Justice issued guidance on the NVRA that, as the Department explained to the Sixth Circuit below, "addresses the precise issue presented in this case and articulates the Department's position that States must have reliable

evidence indicating a voter's change of address before they initiate the NVRA-prescribed process to cancel the voter's registration based on a change of residence." United States Sixth Cir. Br. 2; *see also id.* at 15. The Department revised that guidance when it switched its position in this case, in August 2017. *See* Br. for the United States 14 n.4.

The real-world concerns that motivated the Congresses that enacted the NVRA and HAVA to ban the practice of purging for non-voting remain just as relevant today. *Amicus* Professor Lichtman analyzed voter registration files as part of his work as an expert in a recent North Carolina voting rights case and concluded that upwards of 37,000 North Carolina citizens registered in 2002 but did not vote for the first time until 2012. *See* Response Report of Allan Lichtman, *North Carolina State Conf. of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C. submitted Mar. 24, 2015) (on file with authors); *see also* ECF No. 291-2 at 29, *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658. These voters likely had any number of explanations for their decade-long dormancy, but whatever their reasons, they are precisely the voters Congress sought to protect when it ended the practice of purging for non-voting.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Sixth Circuit.

Respectfully submitted,

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